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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Estate of JEANETTE DUNN, Deceased.

JAMES PARKER, as Special
Administrator, etc.,

Petitioner and Respondent,

v.

KATHLEEN ANN NIXON,

Objector and Appellant.

D073695

(Super. Ct. No. 37-2017-00014738-
PR-LS-CTL)

APPEAL from an order of the Superior Court of San Diego County, Julia Craig
Kelety, Judge. Affirmed.

Goodwin Brown Gross & Lovelace and Craig Gross for Objector and Appellant.

Kimball, Tiery & St. John and Charles T. Scott for Petitioner and Respondent.

I

INTRODUCTION

The successor Trustee of a Trust created by a Husband and Wife appeals from an order on the merits of a probate claim. At issue is whether the Husband's unilateral Revocation of the Trust applied only to his undivided share of the community property held in the Trust or to all of the community property held in the Trust. We conclude, as the probate court did, the Revocation applied to all of the community property held in the Trust. Consequently, we affirm the probate court's order.

II

BACKGROUND

A

During their marriage, Husband and Wife created the Trust, which they later amended and restated. The Trust estate included numerous items of personal and real property, including three homes located in San Diego County.

Relevant to this appeal, the Trust provided,

"All property, whether community or separate, transferred to the trust shall be deemed community property prior to and after its transfer and may be referred to as the 'community trust estate.' "

The Trust additionally provided,

"During the settlors' joint lives, either or both settlors may revoke from the trust the community trust estate in whole or in part by a written document delivered to the trustee that the trustee may require to be acknowledged. On revocation, the trustee shall promptly deliver to both settlors or their designee the revoked portion of the community trust estate, which shall continue as the settlors' community property. If the settlors revoke this trust with respect to

all or a major portion of the trust estate, then the trustee may retain sufficient assets reasonable to secure payment of liabilities lawfully incurred by the trustee in the administration of the trust, unless the settlors indemnify the trustee against losses or expenses."

B

According to the parties, Husband and Wife subsequently separated, Wife moved to another state, and dissolution proceedings commenced. While the dissolution proceedings were pending, Husband executed a "Revocation of Trust." The attorney who prepared the Revocation stated the Revocation's purpose was to allow Husband to exercise testamentary control over Husband's interest in the Trust estate should Husband predecease Wife.

The attorney stated the Revocation was not intended to revoke the Trust in its entirety. The Revocation was only intended to revoke Husband's interest in the Trust estate. The attorney believed the automatic temporary restraining orders in effect in the dissolution proceedings prevented Husband from unilaterally revoking the Trust as to Wife's share of the community property. The attorney also believed the Trust language allowed Husband to revoke only Husband's share of the community property estate from the Trust. Consequently, in the Revocation's "Recitals" section, the Revocation stated,

"[Husband] intends to revoke the trust and remove any of his interest in property currently held within the Trust Estate immediately so that he can execute a temporary Last Will and Testament to distribute his share of the assets formerly held in the Trust."

Nonetheless, the Revocation's "Formal Revocation of Trust" section stated more broadly,

"I, [Husband], hereby revoke the [Trust] and any amendments or restatements thereto. The effective date of the termination of the Trust shall be the date of delivery to counsel for [Wife]."

The attorney who prepared the Revocation did not believe the Revocation would be sufficient to remove any property from the Trust. Instead, the attorney believed Wife would have to revoke her interest in the Trust and both Husband and Wife would have to sign and record deeds transferring the Trust's real property assets out of their names as cotrustees of the Trust. Accordingly, the Revocation's "Formal Revocation of Trust" section stated,

"I, [Husband], understand that following the execution of this [Revocation], the trustees must formally remove his share of the assets from the Trust by filing the appropriate deeds with the county recorders where real property assets are located, contacting various banks, brokerages and other institutions holding Trust assets and requesting that this change be completed.

"Furthermore, I, [Husband], understand that the appropriate deeds and other documentation will need to be prepared and sent to [Wife] for this purpose after she confers with her counsel. However, I intend to revoke my interest in the Trust immediately and the lack of additional documentation discussed above shall not be construed as evidence against my intent to formally revoke my interest [in] the [Trust] immediately by executing this Revocation."

Two months after Husband executed the Revocation, he created a new trust and a new will. Four months after Husband executed the Revocation, he executed quitclaim deeds for each of the San Diego County properties. The deeds purport to transfer the properties from Husband and Wife as trustees of the Trust to Husband and Wife as tenants in common.

C

Meanwhile, Wife's Personal Representative applied in the state where Wife was living to be appointed the permanent guardian of Wife's person and estate. The application stated Wife was

"incapacitated because of a mental condition. The nature of her incapacity is mental deterioration, the degree of her incapacity is total, and the severity of her incapacity is her inability to make decisions on her financial, personal, and medical matters. [Wife] is totally without capacity ... to care for herself, to manage her property, to operate a motor vehicle, to vote in a public election, and [to] make personal decisions regarding residence."

The application included a physician's certificate indicating Wife was partially incapacitated, meaning she lacked the capacity to do some, but not all, of the tasks necessary to care for herself or to manage her property. More particularly, the physician's certificate indicated Wife had dementia and deficits in the area of short-term memory, long-term memory, immediate recall, grasping abstract aspects of her situation, and breaking down and carrying out complex tasks. In addition, while Wife could contribute to decisions, she was not able to make complex business, managerial, and financial decisions; manage a personal bank account; safely operate a motor vehicle; vote in a public election; make decisions regarding marriage; determine her own residence; administer her own medications; consent to psychological and psychiatric treatment; or

attend to instrumental activities of daily living, such as shopping, cooking, traveling, and cleaning.¹

D

Four months after the physician prepared the certificate indicating Wife was partially incapacitated, Wife signed the quitclaim deeds. The deeds were never recorded because of irregularities in the notarial certificates. In addition, Husband disputes their validity, asserting Wife lacked the capacity to sign them.

E

Seven months later, Personal Representative, acting as Wife's attorney-in-fact under a power of attorney, executed a "Revocation of Trust" nearly identical to Husband's Revocation. Wife died the next day.² Husband contends Wife's revocation is invalid in part because the Trust did not allow for its revocation by an attorney-in-fact acting for a settlor under a power of attorney.

F

Two months after Wife died, Personal Representative submitted Wife's most recent will for probate in the state where Wife had been living. The will left Wife's estate to her children. Wife signed the will two months before Personal Representative applied to become the guardian of Wife's person and estate.

¹ The record does not include information about the outcome of the guardianship application.

² The dissolution proceedings were still pending when she died.

Husband applied to set aside the will on the ground Wife lacked testamentary capacity. In addition, Trustee counter-applied to probate Wife's earlier will, which she signed at the same time she and Husband amended and restated the Trust. The earlier will left any of her property not disposed of by will or trust to Husband and left the residue of her estate to the trustee of the Trust. According to the parties, the will contest is still pending.

G

Three months after Wife died, Trustee signed quitclaim deeds purporting to transfer the three houses in San Diego County from the Trust to Husband's new trust. Personal Representative subsequently filed a petition in probate court to recover Wife's share of the Trust property for Wife's estate and to impose an equitable and constructive trust on the Wife's share of the Trust property as well as her share of the rents from the Trust's real property.³

The threshold legal question presented by the petition and decided by the probate court was whether Husband's unilateral Revocation applied only to Husband's undivided share of the community property held in the Trust or to all of the community property held in the Trust. If the latter, Wife's share of the community property was not in the Trust at the time of her death and will be distributed according to the provisions of whichever of her wills is determined to be controlling. If the former, then some or all of

³ The probate court appointed Personal Representative to be the special administrator of Wife's California estate.

Wife's share of the community property was in the Trust at the time of her death and will be distributed in accordance with the terms of the Trust.⁴

Based on the Trust's language, the probate court concluded the Revocation applied to all of the community property held in the Trust. Thus, the court concluded the Trust did not include any of Wife's share of the community property and her share would be distributed either through this ancillary estate proceeding in California or through the out-of-state probate proceeding.

III

DISCUSSION

We review the probate court's decision de novo. (*Pratt v. Ferguson* (2016) 3 Cal.App.5th 102, 109; *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439–1440 (*Powell*).) "The paramount rule in construing [a trust] instrument is to determine intent from the instrument itself *and in accordance with applicable law*. [Citations.]' [Citations.]" (*Ammerman v. Callender* (2016) 245 Cal.App.4th 1058, 1073, italics added.)

Among the law relevant to intent in this case, Probate Code section 15401, subdivision (b)(1), provides, "Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the

⁴ In his papers below, Personal Representative alternatively asserted Husband revoked the Trust as to the three homes in San Diego County when Husband signed the quitclaim deeds transferring the homes from Husband and Wife as the trustees of the Trust to Husband and Wife as tenants in common. The probate court did not reach this issue and neither do we.

trust contributed by that settlor, *except as provided in Section 761 of the Family Code.*"

(Italics added.) Subdivision (b) of Family Code section 761 provides in part, "Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone." Collectively, these statutes require courts to interpret the power to revoke contained in Family Code section 761, subdivision (b), "to cover the entire trust corpus rather than just the revoking trustor's share. [Citation.] Hence, revocation of a joint trust by one spouse is effective as to all community property in the trust. (Fam. Code, § 761, subd. (b).) However, as to other property in the trust, revocation is effective only as to the revoking party's share of the property. (Prob. Code, § 15401, subd. (b).)" (*Powell, supra*, 83 Cal.App.4th at pp. 1440–1441; see Rest.3d Trusts, § 63, com. k [For a trust established by spouses and consisting of their community property, "[i]n the absence of a contrary provision in the terms of the trust, the trust ... may be revoked by either spouse acting alone, thereby terminating the trust and causing the property to be restored to the spouses, free of trust, as their community property. This construction of the spouses' revocable living trust is consistent with the community-property character of the assets and is appropriate to preserve that character while the assets are held in the trust," italics omitted].)

Given this applicable law, we conclude the Trust provision authorizing revocation during the settlors' lives allowed a settlor to revoke from the Trust all of the settlors' community property or any specific item of community property. However, the provision did not allow a settlor to revoke only the settlor's undivided interest in all or any specific item of community property.

Our interpretation gives effect to the language in the provision allowing for revocation of "the community trust estate in whole or in part." It is also consistent with the language in the provision requiring the trustee, on revocation, to "promptly deliver to both settlors ... the revoked portion of the community trust estate, which shall continue as the settlors' community property." (Prob. Code, § 21120 ["The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative"].)

Moreover, unlike the Trustee's proffered interpretation, our interpretation does not violate the prohibition against allowing a husband and wife to partition community assets before entry of a dissolution decree. (Code Civ. Proc., § 872.210, subd. (b); *Jacquemart v. Jacquemart* (1956) 142 Cal.App.2d 794, 796.) Also, unlike the Trustee's proffered interpretation, our interpretation does not violate the prohibition against transmuting real property from community property into separate property without a writing that:

(1) expressly declares the characterization or ownership is being changed; and (2) is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected. (Fam. Code, § 852, subd. (a); *Estate of MacDonald* (1990) 51 Cal.3d 262, 272.) Accordingly, we conclude, as the probate court did, the Revocation applied to and removed all of the community property estate from the Trust.

IV

DISPOSITION

The order is affirmed. Respondent is awarded costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

IRION, J.